The "Discretionary Function" and "Assault and Battery" Exceptions to the Federal Tort Claims Act (FTCA): When They Apply and How They Work Together

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Introduction

You have just arrived at the office for another exciting day in the world of Army claims. As you sit down to drink your coffee and prepare for the morning's activities, your senior claims examiner steps hurriedly into your office and unfolds a newspaper on your desk. On the front page, in bold, inch-high letters, is the headline: "Army Soldier Arrested, Charged With Murder." The promise of a calm day has just been shattered.

Scanning down the page, you learn that the soldier referred to in the article was already facing disciplinary action under the Uniform Code of Military Justice (UCMJ) on an unrelated but serious charge. Worse yet, his commander had decided not to impose pretrial confinement. The soldier should have been on restriction at the time of the murder. Before you have finished reading the article, the newly hired attorney for the victim's family calls. He has learned that the soldier had a checkered service record and had committed violent acts in the past. In a demanding voice, he asks, "What was that commander thinking by failing to impose pretrial confinement on such a dangerous person?" He accuses the Army of negligently endangering the victim by violating its own rules. You know what to expect next—an FTCA claim for wrongful death.

The claim eventually arrives, accompanied by a folder full of newspaper articles questioning the Army's failure to prevent this crime. As you copy the documents and prepare to send off a mirror file to your Area Action Officer (AAO), you cannot help but sympathize with the Assistant U.S. Attorney who will have to dispose of this case. The claimant's attorney is unlikely to agree to any amount the government is likely to offer. A judge or jury would probably sympathize with the plaintiffs after hearing the gruesome facts. How will you handle this claim?

An experienced claims judge advocate will likely begin responding to such a claim by drafting a memorandum for the AAO recommending that the Army deny the claim. The FTCA creates two significant defenses that could apply in this case; their effect is to shield the federal government from the independent violent acts of its employees and the policy decisions that may have made those acts possible. The "discretionary function" and "assault and battery" exceptions, as they are commonly known, operate as threshold exclusions, exempting the United States from liability.[1] Often, as in the hypothetical case described above, the facts of a claim will trigger both defenses. Every claims judge advocate can benefit from understanding these defenses and knowing when to assert them.

Discretionary Function Exception to the FTCA

The FTCA's waiver of sovereign immunity is subject to several exceptions.[2] First, the government is not liable for any claim based on a government agency or employee's exercise (or failure to exercise) of a discretionary function. This exception may even apply to actions that constitute abuses of discretion.[3] In *United States v. Gaubert*,[4] the Supreme Court defined a two-part test for applying this exception. Initially, the test requires a determination that the challenged conduct "involves an element of judgment or choice."[5] If this prong is met, a court must then determine "whether that judgment is of the kind that the discretionary function exception was designed to shield."[6] The exception exists to prevent "judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[7]

If a regulation governs the agency action that is the subject of the claim, a court will next test the action's compliance with

1. 28 U.S.C. § 2680 (2000).

2. *See id.*

3. *Id.* § 2680(a).

4. 499 U.S. 315 (1990).

5. *Id.* at 322 (quoting Berkovitz v. United States, 486 U.S. 531, 536 (1988)).

6. *Id*.

7. *Id.* at 323 (quoting United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797, 814 (1984)).

that regulation. If an employee disobeys a specific regulation, the action could not have been truly discretionary, and the government will not enjoy the exception's protection.[8] If a regulation gives the employee discretion, however, "the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations."[9] Courts recognize that agencies also rely on internal guidelines and policies to guide their actions; the discretionary function exception also covers decisions made under such guidelines.[10] Consistent with their traditionally strict construction of waivers of sovereign immunity, courts disfavor lawsuits against government agencies acting within their discretion. As the Supreme Court said in *Gaubert*, "[F]or a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime."[11]

Federal circuit courts have applied *Gaubert* to a variety of circumstances.[12] For example, the Court of Appeals, Eleventh Circuit, has consistently applied the *Gaubert* test as its standard of review in cases involving the discretionary function exception.[13] It has strictly construed the test with respect to decisions covered by regulations or agency policies, stating that "the relevant inquiry is whether controlling statutes, regulations, and administrative policies mandated" the challenged conduct.[14] Further, federal employees and agencies are permitted a degree of discretion even within the general duty to abide by a rule: "Even though a statute or regulation imposes a general duty on a government agency, the discretionary function exception may still apply if the agency retains sufficient discretion in fulfilling that duty."[15]

Could a claims judge advocate cite *Gaubert* to argue in favor of denying the hypothetical wrongful death claim discussed above? Case law strongly suggests that one could. A federal district court had the opportunity to address a similar set of facts in *Malone v. United States*.[16] In *Malone*, commanders placed a soldier pending trial for rape on restriction, but did not pursue pre-trial confinement. The soldier went absent without authority the day after he submitted an offer to plead guilty; soon thereafter, he raped another woman. The second victim, a civilian, sued the Army, alleging that the soldier's commanders negligently endangered the public when they failed to place him in pretrial confinement.[17]

After reviewing and applying the *Gaubert* test, the district court granted the government's motion for summary judgment.[18] The court examined Rule for Courts-Martial 305[19] and found that the rule only provided a set of factors for a commander to consider, and that "no mandatory directive existed

8. *See id.* at 324.

9. *Id*.

10. *Id.* ("When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion.").

11. *Id*. at 325.

12. *See, e.g.*, Medina v. United States, 259 F.3d 220 (4th Cir. 2001) (holding that an INS decision that assault and battery is a crime of moral turpitude is a discretionary function under 28 U.S.C. § 2680(a)); Edwards v. Tenn. Valley Auth., 255 F.3d 318 (6th Cir. 2001) (holding that Tennessee Valley Authority was not liable for failing to maintain safety standards around the shoreline of lake-front property because no regulatory requirement exists); Claude v. Smola, 263 F.3d 858 (8th Cir. 2001) (holding that the government was not liable to a landowner where a contractor performed unsatisfactory repair work paid by a federal rural development grant; Department of Agriculture's lack of guidance to owner on which contractor to select was discretionary); Sloan v. United States, 236 F.3d 756 (D.C. Cir. 2001) (holding that the plaintiff could not recover damages for an unwarranted suspension of plaintiff's government contract because federal regulations specifically state that suspension is a discretionary action); Shansky v. United States, 164 F.3d 688 (1st Cir. 1999) (holding that aesthetic considerations, including decisions to preserve the historical accuracy of national landmarks, are legitimate policy concerns); Franklin Sav. Corp. v. United States, 180 F.3d 1124 (10th Cir. 1999) (holding that the discretionary function exception compels dismissal of any claim requiring judicial scrutiny of a federal official's good faith or subjective decision-making); Theriot v. United States, 245 F.3d 388 (5th Cir. 1998) (holding that federal officials acted within their discretion under the Admiralty Act when they warned mariners of the location of an underwater sill on navigational charts rather than physically marking the site); Calderon v. United States, 123 F.3d 947 (7th Cir. 1997) (holding that the discretionary function exception applied to a Bureau of Prisons official's decision not to separate the plaintiff from his cellmate).

13. *See, e.g.*, Cohen v. United States, 151 F.3d 1338, 1341 (11th Cir. 1998); Ochran v. United States, 117 F.3d 495, 499 (11th Cir. 1997); Autery v. United States, 992 F.2d 1523, 1526 (11th Cir. 1993).

14. *Autrey*, 992 F.2d at 1528.

15. *Cohen*, 151 F.3d at 1342. *See also Ochran*, 117 F.3d at 500.

16. 61 F. Supp. 2d 1372 (S.D. Ga. 1999).

17. *Id*. at 1374.

18. *Id*. at 1382.

19. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305 (2002).

that the commanders were compelled to follow."[20] Thus, the soldier's commanders did not violate a mandatory regulation when they placed the soldier on restriction rather than in pretrial confinement.[21] Turning to the second prong of the test, the court found that how to restrain a soldier is an "inherently policy laden" decision.[22] The court further noted that the issues for a commander's consideration, such as the individual rights of soldiers, the protection of the public, and the scope of the military investigation, were "exactly the type of policy judgments that the discretionary function is designed to shield."[23]

Assault and Battery Exception to the FTCA

A second exception to the FTCA's waiver of sovereign immunity applies to claims "arising out of assault [or] battery."[24] A plurality of the Supreme Court addressed the scope of this exception in *United States v. Shearer*.[25] In *Shearer*, a soldier just released from prison after serving a four-year term for manslaughter kidnapped and killed another soldier. The administratrix of the victim's estate sued the government for negligently failing to prevent the assault and battery.[26] The plurality opinion stated that the assault and battery exception barred the claim, finding that "[n]o semantical recasting of events can alter the fact that the battery was the immediate cause of Private Shearer's death and, consequently, the basis of respondent's claim."[27] The Court opined that a broad reading of the assault and battery exception was necessary to effectuate Congress's intent in creating it:

> Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery . . . . It is clear that Congress passed the Tort Claims Act on the straightforward assurance that the United States would not be financially responsible for the assaults and batteries of its employees.[28]

Thus, a claimant cannot circumvent application of this exception by framing a complaint that "sound[s] in negligence but stem[s] from a battery committed by a Government employee."[29]

The Court slightly narrowed the *Shearer* plurality's holding in *Sheridan v. United States*,[30] when it held that the assault and battery exception did not bar all claims in which an intentional tort by a government employee contributed to the plaintiff's injury. In *Sheridan*, a drunken and injured sailor entered a Navy hospital and brandished a firearm at several sailors. Subsequently, after leaving the hospital while still armed, the sailor shot and seriously injured the plaintiff, who then sued the government for negligence.[31] The district court dismissed the case, citing the assault and battery exception.[32] On review, the Supreme Court reversed the district court's dismissal, stating that the assault and battery exception did not apply because the Navy had violated its own base regulations:

> By voluntarily adopting regulations that prohibit the possession of firearms on the naval base and that require all personnel to report the presence of any such firearm, and by further voluntarily undertaking to provide care to a person who was visibly drunk and visibly armed, the Government assumed [the] responsibility to "perform its good Samaritan task in a careful manner."[33]

Although practitioners usually read *Shearer* and *Sheridan* together to define the limits of the assault and battery exception,

20. *Malone*, 61 F. Supp. 2d at 1379.

21. *Id*. at 1380.

22. *Id*.

23. *Id*.

24. 28 U.S.C. § 2680(h) (2000). This exception does not apply when the persons alleged to have committed the assault are federal law enforcement officers. *Id.*

25. 473 U.S. 52 (1985).

26. *Id*. at 53.

27. *Id*. at 55.

28. *Id.*

29. *Id*.

30. 487 U.S. 392 (1988).

31. *Id*. at 393.

32. *Id*. at 402.

several federal circuits still apply the broader *Shearer* definition of the exception.[34]

The assault and battery exception adds additional strength to the argument for denying the hypothetical claim discussed above. In *Malone*, for example, the district court applied the assault and battery exception in addition to the discretionary function exception. The court looked to *Shearer* and determined that the claim "arose out of" the rape.[35] Although the court allowed that the government could still be liable under *Sheridan* if it owed the plaintiff a duty of due care, it ultimately held that no such duty existed: "The plaintiff cannot argue that the Army owed her a duty arising out of specific military regulations since no such regulations exist in this case. Further, the plaintiff has also failed to establish a general duty to protect owed to her under Georgia law."[36]

The fact that *Malone* analyzes both exceptions separately is significant; either exception alone would have been enough to bar the plaintiff's action against the United States. While *Malone* is not controlling in any federal circuit, it illustrates how a federal court would likely address a claim based on similar facts.

Conclusion

As the day comes to a close, you lean back comfortably in your chair and breathe a sigh of relief. After reading the case law, you now know that what initially appeared to be a nightmare claim is unlikely to result in liability for the Army. The plaintiff's attorney will find it difficult to navigate past both the discretionary function and assault and battery exceptions to the FTCA. Ultimately, the case may go to trial, but the government is likely to prevail. Practitioners should be mindful of the discretionary function and assault and battery exceptions when they examine claims with similar circumstances. Each of these exceptions could ultimately win the day for the government.

33. *Id*. at 401 (quoting Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955)). In *Sheridan*, the district court granted the government's motion for summary judgment on remand. *See* Sheridan v. United States, 773 F. Supp. 786 (D. Md. 1991), *aff'd*, 969 F.2d 72 (4th Cir. 1992).

34. *See, e.g.*, Leleux v. United States, 178 F.3d 750 (5th Cir. 1999) (dismissing plaintiff's negligence claims against the government for sexually transmitted disease she received from navy recruiter); Wise v. United States, 8 F. Supp. 2d 535 (E.D. Va. 1998) (dismissing claims against the government for negligent hiring, retention, and training following a sailor's murder of the plaintiff's child); Naisbitt v. United States, 611 F.2d 1350 (10th Cir. 1980) (holding that the assault and battery exception bars claims of negligence based on assault, battery, rape, and murder, whether or not the employee is on duty at the time of the crimes); Taylor v. United States, 513 F. Supp. 647 (D.S.C. 1981) (holding that the Army was not liable for a soldier's rape and murder of a young girl).

35. *Malone*, 61 F. Supp. 2d 1372, 1380 (S.D. Ga. 1999).

36. *Id*.